UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION	**MDL Docket No. 1290 (TFH)** **Misc. No. 99ms276 (TFH)**
This Opinion applies to: **ADVOCATE HEALTH CARE, et al.,** **Plaintiffs,** **v.** **MYLAN LABORATORIES, INC. et al.,** **Defendants.**	**Civ. No. 99-0790 (TFH)**

MEMORIALIZING OPINION Re: Settlement

After a fairness hearing held in open court on January 29, 2002, the Court granted final approval of the settlement agreement reached in this matter between Plaintiffs and Defendant SST Corporation, and a Final Order and Judgment issued the same day. The Court files this opinion to memorialize the statement of reasons for approval articulated from the bench at the hearing.

I. BACKGROUND[1]

In addition to the agreements it has reached in related actions,[2] SST Corporation ("SST") has entered into a settlement agreement with Plaintiffs in this case. The parties executed their Stipulation of Settlement on February 6, 2001, and at a hearing held on April 27, 2001, the Court preliminarily approved the settlement and conditionally certified the following class for settlement purposes:

> All non-governmental hospitals, health maintenance organizations, health care delivery systems, managed healthcare companies, pharmaceutical wholesalers, distributors, retailers, and other entities that purchased Lorazepam and/or Clorazepate tablets directly from Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., or UDL Laboratories, Inc. ("Mylan") during the period January 1, 1998 through December 31, 2000, including all such entities that purchased Lorazepam and/or Clorazepate tablets at prices contracted for directly with Mylan by a group purchasing organization of which the purchasing entity was a member. Excluded from the class are Defendants and their respective subsidiaries and affiliates.

4/27/01 Or. ¶ 3. On January 16, 2002, Plaintiffs moved for final approval of this settlement and for final class certification,[3] and SST filed a brief supporting approval. No objections to the settlement were filed, and no objectors appeared at the fairness hearing held on January 29, 2002.

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[1]The underlying alleged antitrust violations in this case has been thoroughly discussed in previous decisions of this Court, e.g., FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32-35 (D.D.C. 1999); In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 14-17 (D.D.C. 2001), and thus will not be reiterated in full measure here.

[2] See Connecticut v. Mylan Labs., Inc., No. 98-3115; Maryland v. Mylan Labs., Inc., No. 99-1158; United Wisconsin Services, Inc. v. Mylan Labs., Inc., No. 99-1082; Arkansas Carpenters Health and Welfare Fund v. Mylan Labs., Inc., No. 01-0159; Generic Drug Antitrust Cases: Mylan Generic Drug Antitrust Pharmacy, Judicial Counsel Coordination Proceeding No. 4075 ("Galloway action") (pending in the Superior Court of the State of California for the County of San Francisco).

[3] Plaintiffs have not moved for fees and costs at this time, but will do so in the future. See 1/29/02 Final Order and Judgment ¶ 13.

II. DISCUSSION

A. Final Approval of Settlement Agreement

Approval of a proposed class action settlement lies within the discretion of this Court. In re: Vitamins Antitrust Litig., 2001-2 Trade Cas. (CCH) ¶73,361, 2001 WL 856290, at *1 (D.D.C. July 19, 2001); United States v. District of Columbia, 933 F. Supp. 42, 67 (D.D.C. 1996). Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring class action settlements. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993). While the Court should "scrutinize the terms of the settlement carefully," the discretion to reject a settlement is thus "restrained by the 'principle of preference' that encourages settlements." Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C.1999); see also United States v. District of Columbia, 933 F. Supp. at 47 (" 'The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.' ") (quoting Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983)).

There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e), and the relevant factors may vary depending on the factual circumstances. Pigford, 185 F.R.D. at 98 & n.13 (citing Thomas v. Albright, 139 F.3d

227, 231 (D.C. Cir. 1998)). Generally, in determining whether a settlement should be approved, courts consider whether the proposed settlement "is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by settlement rather than pursued." Manual for Complex Litigation (Third), § 30.42 at 238 (1995). In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel. See Thomas, 139 F.3d at 231-33; Pigford, 185 F.R.D. at 98-101; Osher v. SCA Realty I, 945 F. Supp. 298, 304 (D.D.C. 1996); Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997); Pray v. Lockheed Corp., 644 F. Supp. 1289, 1290 (D.D.C. 1986); In re Nat'l Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974); see also Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985). The Court finds this settlement agreement fair, reasonable, and adequate for the reasons discussed below.

(a) Arms-Length Negotiations

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.' " In re: Vitamins, 2001 WL 856290, *2 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)). Plaintiffs' counsel have significant antitrust litigation experience, and after carefully reviewing the declaration submitted in support of their motion for final approval, the Court is satisfied that the parties reached this settlement only after arms-length negotiations conducted in good faith, over the course of several months, and after substantial

factual investigation and legal analysis. See Declaration of Mary N. Strimel ¶¶ 2-3, 1/16/02 Mot., Ex. B.

(b) Terms of Settlement in Relation to Strength of Plaintiffs' Case

Under the settlement agreement, SST agrees to pay a total of $2 million for the release of all claims against it in this action and related actions. Upon final approval of all settlements, the $2 million will be allocated as follows: (1) $500,000 will go to the settlement in this action; (2) $500,000 will go to the Plaintiff States' settlement; (3) $400,000 will go to the third party payors' settlements; (4) $100,000 will go to the settlement in the Galloway action; and (5) $500,000 will be divided among the various settlements with up to $250,000 of it going toward the notice costs related to this settlement; the remaining $250,000 will be divided in three equal parts, with one-third going toward the settlement fund in this action, one-third going toward the settlement fund in the Plaintiff States' action, and one-third going toward the settlement fund in the United Wisconsin, Arkansas Carpenters, and Galloway actions. See Stipulation of Settlement § III.A, 1/16/02 Mot., Ex. A. In addition to the cash payment, SST has agreed to provide specified cooperation to Plaintiffs in their ongoing litigation against the remaining defendants. See id. § III.D. The cooperation includes interviews of key SST employees, acceptance of trial subpoenas on their behalf, and production of documents. See id.

These terms must be balanced against the continued expense and risks of lengthy and complex antitrust litigation. Plaintiffs first would have to survive further pretrial motions. And to prevail a trial, Plaintiffs would have to overcome the difficulties inherent in proving antitrust conspiracy and damages. Even assuming Plaintiffs could prevail at trial, post-trial motions and appeals would inevitably delay and further risk recovery. See In re: Vitamins Antitrust Litig.,

2000-1 Trade Cas. (CCH) ¶72,862, 2000 WL 1737867, *4 (D.D.C. Mar. 31, 2000) ("Antitrust price fixing actions are generally complex, expensive, and lengthy. Trial of this matter easily could have lasted months and may not even have started for many years; and any verdict inevitably would have led to an appeal and might well have resulted in appeals by both sides and a possible remand for retrial, thereby further delaying final resolution of this case."); Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interest of the Class.").

Moreover, SST was only a secondary defendant in terms of liability and has significantly less financial resources than the Mylan defendants. Unlike Mylan, SST did not sell lorazepam or clorazepate to class members; it merely supplied the lorazepam active pharmaceutical ingredient ("API"). And unlike the other API suppliers, Profarmaco and Gyma, SST declined to enter an exclusive supply arrangement with Mylan. For such reasons, the FTC did not name SST as a defendant in its lawsuit. Plaintiffs, however, maintain that SST supported Mylan's plan to raise the price of lorazepam tablets by raising SST's prices for SST's lorazepam API to supra-competitive levels.

Comparing the terms of this settlement against these facts, the Court concludes that SST's cash payment and cooperation is proportionate to SST's involvement in the alleged antitrust violations and reasonable under the circumstances.

(c) Status of the Litigation at the Time of Settlement

Early settlement of these types of cases is encouraged. See, e.g., In re: Vitamins Antitrust Litig., 1999-2 Trade Cas. (CCH) ¶72,726, 1999 WL 1335318, *4 (D.D.C. Nov. 23, 1999) ("The

pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes.") (citing In re Cincinnati Gas & Elec. Co. Sec. Litig., 643 F. Supp. 148, 151 (S .D. Ohio 1986), and Muchnick v. First Fed. Sav. & Loan Ass'n of Philadelphia, 1986 WL 10791, at *3 (E.D. Pa. Sept. 30, 1986)). Courts thus consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-à-vis the probability of success and range of recovery accordingly. See, e.g., Ressler v. Jacobson, 822 F. Supp. 1551, 1554-55 (M.D. Fla. 1992) (stating that "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations" and concluding that "the plaintiffs [had] conducted sufficient discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation") (citing In re Corrugated Container Antitrust Litig., 643 F.2d 195, 211 (5th Cir. 1981), and Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977)); Luevano v. Campbell, 93 F.R.D. 68, 86 (D.D.C. 1981) ("In evaluating the fairness and adequacy of a settlement, it is important to consider whether the settlement was reached after extensive factual development, so that counsel on both sides would have had information sufficient to make a reasonable assessment of their risks of litigation.").

This settlement agreement has been reached after several years of investigation and litigation. The parties have engaged in significant discovery, providing Plaintiffs sufficient information to enter into this agreement. Because the case is still in the discovery stage, moreover, this settlement comes at a beneficial time; it will save the parties significant resources and will provide cooperation in the ongoing litigation.

(d) Reaction of Class

A total of 55,425 notices were mailed by the Class Administrator to all potential members of the class that could be identified from Mylan's database of direct customers. See Supplemental Affidavit of Richard Cody Bland ¶ 5, 1/16/02 Mot., Ex. C. In addition, Plaintiffs published summary notices in commonly read publications in the industry, *Modern Healthcare Magazine* and *The Pink Sheet*, and on the websites of class counsel, Cohen, Milstein, Hausfeld & Toll, P.L.L.C. and Pomerantz Haudek Block Grossman & Gross, LLP, from September 15, 2001 through at least December 14, 2001. See id.; Declaration of Mary N. Strimel ¶ 4, 1/16/02 Mot., Ex. B. No objections have been filed to this settlement, see Declaration of Mary N. Strimel ¶ 6, 1/16/02 Mot., Ex. B, and no objectors were present at the fairness hearing held on January 29, 2002. Finally, there have been 99 opt-outs, which represents a mere 0.18% of those Class Members who received mailed notice. See Supplemental Affidavit of Richard Cody Bland ¶ 7, 1/16/02 Mot., Ex. C. From these facts, the Court has little difficulty concluding that the class reaction overwhelmingly favors this settlement.

(e) Opinion of Experienced Counsel

Given both parties' counsel's significant antitrust litigation experience, the information they had after discovery, and the arms-length negotiations through which they reached this settlement, the Court will credit their opinion that these settlements are fair, reasonable, and adequate.

B. Class Certification

Plaintiffs have also moved for final certification of the following class for settlement

purposes only:

> All non-governmental hospitals, health maintenance organizations, health care delivery systems, managed healthcare companies, pharmaceutical wholesalers, distributors, retailers, and other entities that purchased Lorazepam and/or Clorazepate tablets directly from Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., or UDL Laboratories, Inc. ("Mylan") during the period January 1, 1998 through December 31, 2000, including all such entities that purchased Lorazepam and/or Clorazepate tablets at prices contracted for directly with Mylan by a group purchasing organization of which the purchasing entity was a member. Excluded from the class are Defendants and their respective subsidiaries and affiliates.

4/27/01 Or. ¶ 3. A settlement class certification must comply with all four prerequisites of Rule 23(a) and one of the three subsections of Rule 23(b). See Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998).

The settlement class satisfies all four requirements of Rule 23(a). Rule 23(a) permits certification only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. Proc. 23(a). First, there are thousands of plaintiffs, rendering joinder impracticable. See, e.g., Arnold v. Postmaster General, 667 F. Supp. 6, 15 (D.D.C. 1987) (finding class of 39 to a few hundred class member to be sufficient to sustain class action), rev'd on other grounds, 863 F.2d 994 (D.C. Cir. 1988); Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234, 1242 (D.D.C. 1988) (finding class of 63 plaintiffs sufficient to sustain class action), rev'd on other grounds, 28 F.3d 130 (D.C. Cir. 1994). Second, price-fixing cases generally deal with common legal and factual questions surrounding the existence, scope, and effect of the alleged conspiracy, see, e.g.,

In re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 273 (D.D.C. 1972); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 510 (S.D.N.Y. 1996), and this case presents no exception. There are several issues common to all members of the proposed class here, including whether SST and Mylan agreed to fix and raise prices for lorazepam, the duration of any such conspiracy, the effectiveness of any such conspiracy, the impact of any such conspiracy on the prices paid by class members, and the measure of damages. Third, the claims appear to be typical of those of the rest of the class members in that they allege illegal combination, conspiracy, or agreement by the defendants, which resulted in the anticompetitive injuries. See Pigford v. Glickman, 182 F.R.D. 341, 349 (D.D.C. 1998) (stating that typicality is met "if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability"). Finally, the named representatives here have no conflicting interests with absent members of the class, and counsel is qualified and experienced. See Kifafi v. Hilton Hotels Retirement Plan, 189 F.R.D. 174, 177 (D.D.C. 1999) (citing Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997)); Pigford, 182 F.R.D. at 350 (citing Twelve John Does, 117 F.3d at 575).

With respect to Rule 23(b), Plaintiffs have moved for certification under subsection (3), which requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Rule further provides that matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution

> or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[4]

Id. Cases alleging a price fixing conspiracy readily meet the predominance factor. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 38 (S.D.N.Y. 1977); In re Playmobil Antitrust Litig., 35 F. Supp.2d 231, 238 (E.D.N.Y. 1998); Brown v. Pro Football, Inc., 146 F.R.D. 1, 4 (D.D.C. 1992); In re Plastic Cutlery Antitrust Litig., No. 96-CV-728, 1998 WL 135703, at *2 (E.D. Pa. Mar. 20, 1998). The common issues identified above, including whether SST and Mylan agreed to fix prices and the duration of, and damages stemming from, the alleged conspiracy, clearly predominate over any individual issues. And prosecuting the claims as a class action is a superior device for handling the thousands of claims from the individuals involved in this case; addressing this matter through thousands of individual cases would waste all parties' and the Court's resources.

[4] The Supreme Court has stated, however, that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); see Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998).

III. CONCLUSION

For the foregoing reasons, and for the reasons articulated from the bench at the fairness hearing, the Court issued the Final Order and Judgment on January 29, 2002, approving the settlement in this case between Plaintiffs and SST and certifying the class as defined above for settlement purposes.

January 31, 2002

Thomas F. Hogan
Chief Judge